IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

MESA POWER GROUP LLC

Claimant/Investor,

-and-

GOVERNMENT OF CANADA,

Respondent/Party.

(PCA Case No. 2012-17)

SUBMISSION OF THE UNITED STATES OF AMERICA

1. The United States of America hereby makes this submission pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA"), which authorizes non-disputing Parties to make submissions to a Tribunal on a question of interpretation of the NAFTA. The United States does not, through this submission, take a position on how the following interpretation applies to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

Article 1120 (Submission of a Claim to Arbitration)

2. NAFTA Article 1121, entitled "Conditions Precedent to Submission of a Claim to Arbitration," provides in part that "[a] disputing investor may submit a claim under Article 1116 to arbitration only if: (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement . . . ." NAFTA Article 1122, entitled "Consent to Arbitration," further provides in part that "[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement." No Chapter Eleven claim may be submitted unless these procedures have been satisfied.

3. NAFTA Article 1120, entitled "Submission of a Claim to Arbitration," contains one such procedure. Article 1120(1) states that a disputing investor may submit a claim to arbitration "provided that six months have elapsed since the events giving rise to a claim." Together with the notice requirement in Article 1119, the "cooling-off" requirement in Article 1120(1) affords a

NAFTA Party time to identify and assess potential disputes, coordinate among relevant national and subnational officials, and consider amicable settlement or other courses of action prior to arbitration. As such, any claim for which a claimant has not waited six months from the events giving rise to the claim is not submitted in accordance with Article 1120(1),[1] and thus does not satisfy the requirements of consent contained in Articles 1121 and 1122.[2]

4. NAFTA Article 1116(1) further provides that an investor may submit a claim to arbitration that a Party "has breached" certain obligations, and that the investor "has incurred loss or damage by reason of, or arising out of, that breach." Thus, there can be no claim under Article 1116(1) until an investor has suffered harm from an alleged breach. Consistent with Articles 1116(1) and 1120(1), therefore, a disputing investor may submit a claim to arbitration under Chapter Eleven only for a breach that already has occurred and for which damage or loss has already been incurred, provided that six months has elapsed from the events giving rise to the claim. No claim based solely on speculation as to future breaches or future loss may be submitted.

Article 1105 (Minimum Standard of Treatment)

5. On July 31, 2001, the Free Trade Commission ("Commission"), comprising the NAFTA Parties' cabinet-level representatives, issued an interpretation reaffirming that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party."[3] The Commission clarified that "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[4] The Commission further clarified that "a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."[5] In accordance with NAFTA Article 1131(2), "[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section."

6. The Commission's interpretation thus confirms the NAFTA Parties' express intent to establish the customary international law minimum standard of treatment as the applicable standard in NAFTA Article 1105. As the United States has observed in previous submissions in NAFTA Chapter Eleven cases, the minimum standard of treatment is an umbrella concept

[1] Indeed, it is the United States' general practice to refuse to move forward with an arbitration if the notice of arbitration contains such defects. The United States, therefore, would not accept as valid a notice of arbitration if a claimant failed to respect the six-month cooling-period in Article 1120(1).

[2] *See Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, First Partial Award of the Tribunal on Jurisdiction ¶ 120 (Aug. 7, 2002) ("This Tribunal is faced with the same issue of whether the necessary consensual base for its jurisdiction is present . . . . In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all preconditions and formalities required under Articles 1118-1121 are satisfied).").

[3] Notes of Interpretation of Certain Chapter Eleven Provisions, Free Trade Commission ¶ B.1 (July 31, 2001).

[4] *Id.* ¶ B.2.

[5] *Id.* ¶ B.3.

reflecting a set of rules that, over time, has crystallized into customary international law in specific contexts.[6] Article 1105 thus reflects a standard that develops from State practice and *opinio juris*, rather than an autonomous, treaty-based standard. Although States may decide, expressly by treaty, to extend protections under the rubric of "fair and equitable treatment" and "full protection and security" beyond that required by customary international law, that practice is not relevant to ascertaining the content of the customary international law minimum standard of treatment.[7] Arbitral decisions interpreting "autonomous" fair and equitable treatment and full protection and security provisions in other treaties, outside the context of customary international law, do not constitute evidence of the content of the customary international law standard required by Article 1105. While there may be overlap in the substantive protections both types of treaty provisions ensure, a claimant submitting a claim under an agreement such as NAFTA, in which fair and equitable treatment is defined by the customary international minimum standard of treatment, still must demonstrate that the obligations invoked are in fact a part of customary international law.

7. The principle of "good faith," moreover, is not a separate element of the minimum standard of treatment embodied in the Agreement. It is well established in international law that good faith is "one of the basic principles governing the creation and performance of legal obligations," but "it is not in itself a source of obligation where none would otherwise exist."[8]

8. States may modify or amend their regulations to achieve legitimate public welfare objectives and will not incur liability under customary international law merely because such changes interfere with an investor's "expectations" about the state of regulation in a particular sector.[9] Regulatory action violates "fair and equitable treatment" under the minimum standard of treatment where, for example, it amounts to a denial of justice, as that term is understood in customary international law, or constitutes manifest arbitrariness falling below international standards.[10]

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[6] *See, e.g.*, *Methanex v. United States*, Memorial on Jurisdiction and Admissibility of Respondent United States of America, NAFTA/UNCITRAL, at 43 (Nov. 13, 2000); *ADF Group Inc. v. United States*, Post-Hearing Submission of Respondent United States of America on Article 1105(1) and *Pope & Talbot*, NAFTA/ICSID Case No. ARB(AF)/00/1, at 2 (June 27, 2002); *Glamis Gold Ltd. v. United States*, Counter-Memorial of Respondent United States of America, NAFTA/UNCITRAL, at 219-20 (Sept. 19, 2006); *Grand River Enters. v. United States*, Counter-Memorial of Respondent United States of America, NAFTA/UNCITRAL, at 89-93 (Dec. 22, 2008).

[7] *See, e.g.*, *Glamis Gold, Ltd. v. United States*, NAFTA/UNCITRAL, Award ¶¶ 607-08 (June 8, 2009) (concluding that "arbitral decisions that apply an autonomous standard provide no guidance inasmuch as the entire method of reasoning does not bear on an inquiry into custom"); *see also Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening*) 2012 I.C.J. ¶ 55 (Judgment of Feb. 3) ("While it may be true that States sometimes decide to accord an immunity more extensive than that required by international law, for present purposes, the point is that the grant of immunity in such a case is not accompanied by the requisite *opinio juris* and therefore sheds no light upon the issue currently under consideration by the Court.").

[8] *Border and Transborder Armed Actions* (*Nicaragua v. Honduras*), 1988 I.C.J. 69, ¶ 94 (Judgment of Dec. 20) (citation and internal quotation marks omitted).

[9] *See, e.g.*, *Mobil Investments Canada Inc. & Murphy Oil Corp. v. Canada*, NAFTA/ICSID Case No. ARB(AF)/07/4, Decision on Liability and on Principles of Quantum ¶ 153 (May 22, 2012) ("Article 1105 is not, and was never intended to amount to, a guarantee against regulatory change, or to reflect a requirement that an investor is entitled to expect no material changes to the regulatory framework within which an investment is made.").

[10] *See, e.g.*, *International Thunderbird Gaming Corp. v. United Mexican States*, NAFTA/UNCITRAL, Award ¶ 194 (Jan. 26, 2006) (citations omitted); *see also* U.S. Counter-Memorial, *Glamis Gold Ltd. v. United States*,

9. The burden is on a claimant to establish the existence and applicability of a relevant obligation under customary international law that meets the requirements of State practice and *opinio juris*.[11] "The party which relies on a custom," therefore, "must prove that this custom is established in such a manner that it has become binding on the other Party."[12] Once a rule of customary international law has been established, the claimant must show that the State has engaged in conduct that violated that rule.[13] Determining a breach of the minimum standard of treatment "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders."[14]

10. All three NAFTA Parties jointly issued a binding interpretation on the scope of the fair and equitable treatment obligation under Article 1105(1).[15] The United States' views on the relationship between the Interpretation and Articles 1105(1) and 1103 are set out in the attached U.S. non-disputing Party submission in the NAFTA Chapter Eleven arbitration *Chemtura Corporation v. Government of Canada*.

NAFTA/UNCITRAL, at 218-262 (Sept. 19, 2006) (discussing the customary international law minimum standard of treatment in the context of regulatory action); U.S. Rejoinder, *Glamis Gold Ltd. v. United States*, NAFTA/ UNCITRAL, at 139-243 (Mar. 15, 2007) (same).

[11] *See Rights of Nationals of the United States of America in Morocco (France v. United States)*, 1952 I.C.J. 176, 200 (Judgment of Aug. 27) ("The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.") (citation and internal quotation marks omitted); *Glamis Gold Ltd. v. United States of America*, NAFTA/UNCITRAL, Award (June 8, 2009) ¶¶ 601-02 (noting that the claimant bears the burden of establishing a change in customary international law, by showing "(1) a concordant practice of a number of States acquiesced in by others, and (2) a conception that the practice is required by or consistent with the prevailing law (*opinio juris*).") (citations and international quotation marks omitted).

[12] *Asylum (Colombia v. Peru)*, 1950 I.C.J. 266, 276 (Judgment of Nov. 20); *see also North Sea Continental Shelf (Federal Rep. of Germany v. Netherlands/Denmark)*, 1969 I.C.J. ¶ 74 (Judgment of Feb. 20) ("[A]n indispensable requirement [of showing a new rule of customary international law] would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; – and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.").

[13] *See Feldman v. Mexico*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) ("[I]t is a generally accepted canon of evidence in civil law, common law, and in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.").

[14] *S.D. Myers v. Canada*, NAFTA/UNCITRAL, First Partial Award ¶ 263 (Nov. 13, 2000).

[15] Notes of Interpretation of Certain Chapter Eleven Provisions, Free Trade Commission ¶ B.3 (July 31, 2001).

Article 1102 (National Treatment)

11. NAFTA's national treatment provision, Article 1102, is designed to prohibit discrimination on the basis of nationality.[16] Consistent with this purpose, only the disputing Party's "own investors" or "investments of its own investors" may qualify as comparators under Article 1102.[17]

12. Article 1102 paragraphs (1) and (2) are not intended to prohibit all differential treatment among investors or investments. Rather, they are intended only to ensure that Parties do not treat domestically owned entities that are "in like circumstances" with foreign-owned entities more favorably based on their nationality of ownership. If the challenged measure, whether in law or in fact, does not treat foreign investors or investments less favorably than domestic investors or investments that are in like circumstances on the basis of nationality, there can be no violation of Article 1102.

13. The phrase "in like circumstances" ensures that comparisons are made with respect to investors or investments on the basis of relevant characteristics. This is a fact-specific inquiry, requiring consideration of more than just the business or economic sector, but also the legal and regulatory frameworks which apply to or govern the conduct of investors or investments (including any relevant policy objectives), among other possible relevant characteristics.[18]

14. Nothing in Article 1102 paragraphs (1) and (2) requires that investors or investments of investors of a Party, regardless of the circumstances, be accorded the best, or most favorable, treatment given to any national investor or any investment of a national. The appropriate comparison is between the treatment accorded a foreign investment or investor and a national investment or investor *in like circumstances*. This is an important distinction intended by the Parties. Thus, a NAFTA Party may adopt measures that draw distinctions among entities without necessarily violating Article 1102.

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[16] NORTH AMERICAN FREE TRADE AGREEMENT, IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 103-159, Vol. 1, 103d Cong., 1st Sess., at 583 (1993) ("Articles 1102 and 1103 set out the basic non-discrimination rules of 'national treatment' and 'most-favored-nation treatment.'"). All three NAFTA Parties agree that the national treatment obligation under Article 1102 is intended to protect against nationality-based discrimination against an investor or investment. *See Pope & Talbot, Inc. v. Canada*, Submission of the United States of America, NAFTA/UNCITRAL ¶ 3 (Apr. 7, 2000); *Pope & Talbot, Inc. v. Canada*, Second Submission of the United States of America, NAFTA/UNCITRAL ¶ 3 (May 25, 2000); *Pope & Talbot, Inc. v. Canada*, Supplemental Submission of the United Mexican States § A.1, at 2-3 (May 25, 2000); *Methanex v. United States*, Fourth Submission of the Government of Canada Pursuant to NAFTA Article 1128, NAFTA/UNCITRAL ¶ 5 (Jan. 30, 2004).

[17] This is supported by NAFTA Article 1139, which defines "investor of a Party" as "a Party or state enterprise thereof, or a national or an enterprise of such Party," and an "investment of an investor of a Party" as one that is owned or controlled by such an investor. Consequently, comparators for the purposes of Article 1102 must have the nationality of the host State and not the nationality of another Party or non-Party.

[18] *See, e.g., Pope & Talbot v. Canada*, Award on the Merits of Phase 2, NAFTA/UNCITRAL ¶ 75 (Apr. 10, 2001) ("It goes without saying that the meaning of the term ['in like circumstances'] will vary according to the facts of a given case. By their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations.").

15. Nothing in the text of Article 1102 suggests a shifting burden of proof. The burden to prove a violation of Article 1102 thus rests with the claimant to prove each element of its claim.[19]

Article 1108 (Reservations and Exceptions)

NAFTA Article 1108(7) provides:

> Articles 1102 [national treatment], 1103 [most-favored-nation treatment], and 1107 [senior managers and directors] do not apply to:
>
> (a) procurement by a Party or a state enterprise . . . .

NAFTA Article 1108(8)(b) further provides:

> The provisions of Article 1106(1)(b), (c), (f) and (g), and (3)(a) and (b) [concerning performance requirements] do not apply to procurement by a Party or a state enterprise.

Article 1108 thus exempts "procurement by a Party or state enterprise" from Chapter Eleven's obligations with respect to national treatment, most-favored-nation treatment, and certain performance requirements.

16. The term "procurement" is not defined in the NAFTA. The ordinary meaning of the term on its face, however, encompasses any and all forms of procurement by a NAFTA Party. This reading is confirmed by the French and Spanish versions of the NAFTA, which each use the generic term for "purchases" in those languages.[20]

17. The term "procurement" is found in several other NAFTA chapters, including Chapter Ten. The United States agrees with Canada that, whereas in Chapter Eleven the term is used as a broad "carve-out," in Chapter Ten the term is used as a "carve-in."[21] Chapter Ten describes the kinds of procurement that are and are not covered by the obligations in Chapter Ten.

[19] *See United Parcel Service of America Inc. (UPS) v. Government of Canada*, NAFTA/UNCITRAL ¶¶ 83-84 (May 24, 2007) (holding the "investor must establish" the elements to prove a violation of Article 1102, and that a claimant's "failure . . . to establish one of those . . . elements will be fatal to its case").

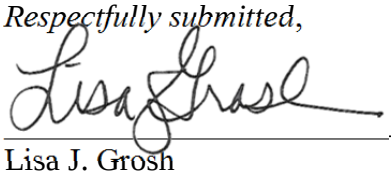
[20] *See, e.g.*, NAFTA art. 1108(7) ("Les articles 1102, 1103 et 1107 ne s'appliquent pas: a) aux *achats* effectués par une Partie . . . .") (emphasis added); *id.* ("Los Artículos 1102, 1103 y 1107 no se aplican a: (a) las *compras* realizadas por una Parte . . . .") (emphasis added); *see also* Vienna Convention, art. 33(3) ("The terms of the treaty are presumed to have the same meaning in each authentic text.").

[21] *See Mesa Power Group, LLC v. Government of Canada*, NAFTA/UNCITRAL, Government of Canada Counter-Memorial and Reply on Jurisdiction ¶¶ 331-32 (Feb. 28, 2014).

Article 1131 (Governing Law)

18. NAFTA Article 1131, entitled "Governing Law," provides in part that a tribunal established under Chapter Eleven "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."[22] Thus, a tribunal constituted under Chapter Eleven must apply the NAFTA as the rule of decision, not the provisions of other treaties.

Respectfully submitted,



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[22] NAFTA art. 1131(1).

Attachment

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

CHEMTURA CORPORATION,

Claimant/Investor,

-and-

GOVERNMENT OF CANADA,

Respondent/Party.

SUBMISSION OF THE UNITED STATES OF AMERICA

1. The United States of America hereby makes this submission pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA"), which authorizes non-disputing Parties to make submissions to a Tribunal on a question of interpretation of the NAFTA. The United States does not, through this submission, take a position on how the following interpretation applies to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

2. For the reasons discussed below, the most-favored-nation ("MFN") obligation under Article 1103 does not alter the substance of the fair and equitable treatment obligation under Article 1105(1).

3. On July 31, 2001, the Free Trade Commission ("Commission"), comprising the NAFTA Parties' cabinet-level representatives, issued a binding interpretation of the NAFTA, as contemplated under Article 1131, confirming that "Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party."[1] The Commission clarified that "the concepts of 'fair and equitable treatment' and 'full

[1] Free Trade Commission, Interpretation of NAFTA, July 31, 2001, at 2.

protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens."[2] The Commission also stated that "a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."[3]

4. Under the "Governing Law" provision of NAFTA Chapter Eleven, Article 1131, the Commission's interpretation is binding on Chapter Eleven tribunals.[4] Under Article 1131, Chapter Eleven tribunals are required to apply governing law, which includes binding interpretations issued by the Commission.[5]

5. Here, all three NAFTA Parties jointly and expressly issued a binding interpretation on the scope of the fair and equitable treatment obligation under Article 1105(1). Moreover, all three Parties later confirmed, through subsequent submissions commenting on that interpretation, that the MFN obligation under Article 1103 did not alter the substantive content of the fair and equitable treatment obligation under Article 1105(1).

6. In a submission to the *Pope & Talbot* tribunal, in a section entitled "Implications of Article 1103," Canada stated that "Article 1103 can no longer be relevant or constitute an issue with respect to the interpretation of Article 1105, as the interpretation of the latter is set out in the Note of Interpretation, which is binding on the Tribunal." Canada further stated that "Article 1131(2) interpretations bind tribunals in stating the governing law, and the NAFTA *cannot operate so as to create a conflict between Article 1103 and the interpretation*."[6] Canada added:

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[2] *Id.*

[3] *Id.*

[4] NAFTA Article 1131 ("Governing Law") states:

> 1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
>
> 2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

[5] The power to issue an authentic interpretation of a treaty remains with the State Parties themselves. *See* IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 136 (2d ed. 1984) ("It follows naturally from the proposition that the parties to a treaty are legally entitled to modify the treaty or indeed to terminate it that they are empowered to interpret it."); NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC, 256 (7th ed. 2002) ("L'interprétation réellement authentique est celle qui est fournie par un accord intervenu entre *tous les États parties au traité*.") (The truly authentic interpretation is that provided by agreement among *all State parties to the treaty*.) (translation by counsel; emphasis in original).

[6] *Pope & Talbot, Inc. v. Canada*, NAFTA/UNCITRAL, Letter from M. Kinnear to Tribunal, Oct. 1, 2001, at 3 (emphasis added), attached at Exhibit A.

> In acting in their plenary capacity as the Free Trade Commission, the Parties act as the guardians of the Treaty. They have the legal right to clarify the meaning of the obligations that they agreed to undertake and have specified in the NAFTA a mechanism for doing so. This right was not only negotiated in the NAFTA; it was also approved by the legislatures of each Party when the Agreement was ratified and implemented. Once they exercise their power, a tribunal must comply with the Commission's interpretation. A refusal to do so would be an act in excess of the governing law jurisdiction that is vested in the Tribunal under Article 1131.[7]

7. Mexico and the United States agreed with Canada's position. In an Article 1128 submission, Mexico informed the *Pope & Talbot* tribunal that it "fully concurs with Canada in the views expressed in Canada's letter . . . to the Tribunal regarding the NAFTA Free Trade Commission's interpretation" and "also concurs with Canada that *Article 1103 cannot be relevant to, or constitute an issue with respect to, the interpretation of Article 1105*."[8]

8. In its own Article 1128 submission, the United States similarly informed the *Pope & Talbot* tribunal that it "fully concurs with Canada in the views expressed in Canada's letter . . . regarding the NAFTA Free Trade Commission's interpretation" and "also concurs with Canada that *Article 1103 cannot be relevant to, or constitute an issue with respect to, the interpretation of Article 1105*."[9]

9. The NAFTA Parties thus unanimously agreed that the MFN obligation under Article 1103 did not alter the substantive content of the fair and equitable treatment obligation under Article 1105(1).

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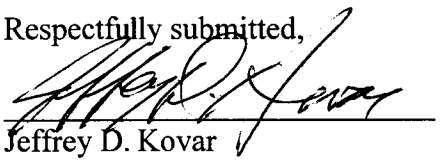
[7] *Id*. at 3-4.

[8] *Pope & Talbot, Inc. v. Canada*, NAFTA/UNCITRAL, Letter from H. Perezcano Díaz to Tribunal, Oct. 1, 2001, at 1 (emphasis added), attached at Exhibit B.

[9] *Pope & Talbot, Inc. v. Canada*, NAFTA/UNCITRAL, Sixth Submission (Corrected) of the United States of America, Oct. 2, 2001, at para. 2 (emphasis added), attached at Exhibit C.

Respectfully submitted,



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July 31, 2009